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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,

Petitioners,

v.

JOHN C. COOK, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the mere continued use of a newly created seniority list, which is challenged by plaintiffs as age-discriminatory because they, allegedly on the basis of their age, had been placed in positions on that new seniority list inferior to the ones they otherwise would have occupied, constitutes a "continuing violation" of the Age Discrimination in Employment Act ("ADEA") tolling indefinitely that Act's statute of limitations, where the plaintiffs' relatively inferior placement on that seniority list and its consequences were known to them at the time of the seniority list's creation and first implementation.

2. Whether the Federal Aviation Act deprives a district court of jurisdiction to entertain a claim to the effect that aspects of an airline's seniority system integrated after a merger violated plaintiffs' rights under ADEA where those aspects had been the subject of plaintiffs' prior challenge to that seniority system made before the Civil Aeronautics Board and that Board had upheld the seniority system in an order that had not been appealed under the terms of the Federal Aviation Act.

THE PARTIES TO THE PROCEEDING

The parties to the proceeding are those listed in the caption except that all of the respondents are listed at pages 27-37 of Appendix 1 to this petition. Petitioner Pan American World Airways, Inc. is a wholly owned subsidiary of Pan Am Corporation.

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OPINIONS IN THE COURTS BELOW

The opinion of the Court of Appeals, which reversed in relevant part the dismissal of this action by the District Court for the Southern District of New York, has been officially reported at 771 F.2d 635, and is set out in Appendix 1. No written opinion was rendered by the District Court for the Southern District of New York; the transcript of the District Court's oral opinion is set out in Appendix 2.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of which review is sought was entered on August 22, 1985. No application for an extension of time to file this petition has been made. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This Appeal involves the interpretation of Section 7(d)(2) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §626(d)(2), which reads in relevant part as follows:

> No civil action may be commenced by an individual under this section [of ADEA] until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed –
>
> . . .
>
> (2) ... within 300 days after the alleged unlawful practice occurred ...;

and section 1006 of the Federal Aviation Act, 49 U.S.C. §1486, the text of which is set out in Appendix 3.

STATEMENT OF THE CASE

In this case plaintiffs have complained principally that a seniority list implemented following the merger of petitioner Pan American World Airways, Inc. ("Pan Am") and the former National Airlines ("National"), discriminated against them on the basis of their age in violation of the Age Discrimination in Employment Act, ("ADEA") 29 U.S.C. §621 *et seq.** (The

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* The complaint also alleges a pendent state age discrimination claim, and various other federal claims; the dismissal of the latter claims was affirmed by the Court of Appeals.

plaintiffs are several hundred Pan Am pilots who, before the Pan Am-National merger, had been with Pan Am.) That integrated seniority list was made necessary because Pan Am, as a condition of the Civil Aeronautics Board's ("CAB") approval of Pan Am's merger with National, was required to comply with Labor Protective Provisions ("LPPs") the CAB had issued in connection with its approval, which Provisions (at Section 3) mandated that the separate seniority lists of pre-merger Pan Am and pre-merger National personnel be integrated "in a fair and equitable manner."

To accomplish that integration with respect to the three classifications of cockpit personnel (*i.e.*, captains, first officers, and flight engineers) petitioners Air Line Pilots Association, International ("ALPA"), the union representing the merged carrier's captains and first officers (collectively termed 'pilots"), and Flight Engineers International Association, Pan Am Chapter ("FEIA"), the union representing the merged carrier's flight engineers, entered into an agreement whereby representatives of four groups of employees (pre-merger Pan Am pilots, pre-merger National pilots, pre-merger Pan Am flight engineers, and pre-merger National flight engineers) would be the parties to a binding arbitration in which the arbitrator would devise an integrated seniority system. Pan Am was not a party to that agreement and was not a party to the arbitration. Nevertheless, after the arbitrator (Lewis Gill) issued his award in March, 1981, a copy of which was sent that month to every pilot and flight engineer, Pan Am agreed (in June of 1981) to accept without change this integrated seniority system Mr. Gill had devised. Thereafter, Pan Am constructed an integrated seniority list pursuant to the Gill award, had it posted in August of 1981, and by October of that year all Pan Am flying was pursuant to the Gill award's integrated seniority list.

The Gill seniority system, to the extent here relevant, called for an integrated seniority list for pilots that was, in its highest and lowest sections, constructed on the basis of length of

service or date of hire; the middle portion of the pilots' list was constructed on a ratio method whereby a (pre-merger) National pilot was inserted on the list after every three or every four (pre-merger) Pan Am pilots, based on their relative positions in the separate pre-merger lists. Plaintiffs in this proceeding challenge the ratio-method portion of the pilots seniority list as constructed under the Gill award claiming that use of the ratio method, as opposed to length of service or date of hire, discriminates against them on the basis of their age because the pre-merger National pilots inserted in the integrated list on a ratio basis are younger than the pre-merger Pan Am pilots among whom they are being inserted. (The merged flight engineers seniority list created by the Gill award did not use a ratio method and is not challenged.)

Relative position on the pilots seniority list as constructed pursuant to the Gill award determined, from the moment the list was first implemented by Pan Am, virtually every aspect of a pilot's employment. Where one was put determined every pilot's relative exposure to "furlough" (*i.e.*, lay-off); every pilot's monthly "lines of flying" (that is, who flies specific trips on specific days each month) and vacations; and every pilot's opportunities to transfer to different aircraft, bases, and cockpit positions (that is, captain, first officer, or flight engineer) in a process know as a "proffer," which transfer affects a pilot's pay immediately as pay is principally determined by the size of the aircraft flown and the cockpit position occupied.

Plaintiffs, who had been sent copies of the Gill award in March, 1981, formed a group ("PAPF," Pan American Pilots Fighting) that petitioned the CAB in July of 1981, *i.e.*, after Pan Am had announced it would accept the Gill award but shortly before the Gill award seniority list was posted and put into full effect, to set aside the Gill award. PAPF asserted to the CAB that, as a matter of law, the Gill award's seniority system was not "fair and equitable" as Section 3 of the CAB's Labor Protective Provisions required in that the portion of the pilots seniority list generated by a ratio method unfairly and

inequitably disadvantaged them, pre-merger Pan Am pilots who had more years of service (and who were older) than the pre-merger National pilots among whom they were inserted. The plaintiffs here claimed, through PAPF, that they were lower on the seniority list than they should be. The CAB, in its Order 82-4-75, adopted April 15, 1982, denied PAPF's petition and found the Gill seniority list, and specifically the portion constructed on a ratio method, to have been fairly and equitably integrated. No appeal of that CAB Order was ever taken to a court of appeals pursuant to 49 U.S.C. §1486(a).

Following Pan Am's implementation of the Gill award's seniority list in 1981, there were no pilot furloughs until 1983. In connection with the fifth "proffer" under the Gill award seniority list, in early 1983 Pan Am announced that there would be lay-offs of cockpit crew members. Following the announcement of those furloughs in which 102 cockpit crew members were eventually furloughed in March and June of 1983, (three of whom were plaintiffs and the remaining 99 were all pre-merger National flight crew members and thus not part of the group of plaintiffs in this case), a number of plaintiffs filed charges of age discrimination with the EEOC. The earliest such charge was filed on April 12, 1983, some 18 months after the integrated seniority list was implemented by Pan Am in October of 1981. If these 1983 furloughs had been necessary in October of 1981, they would have been based on the same Gill award seniority list posted in August, 1981.

This action was commenced on March 7, 1984, in the United States District Court for the Southern District of New York. Defendants moved to dismiss on the grounds that plaintiffs' ADEA claims were untimely because ADEA requires, at the most, that age discrimination charges be filed with the EEOC no later that 300 days "after the alleged unlawful employment practice occurred" (29 U.S.C. §626(d)(2)), and, in this case, plaintiffs had waited at least a year and a half. In addition, the defendants moved to dismiss on the grounds that this lawsuit

constitutes an impermissible collateral attack on a CAB order, which order had found the seniority system at issue to have been fairly and equitably integrated, and which order had not been appealed.

The District Court (Ward, J.) dismissed the complaint in its entirety solely on the grounds that it was an impermissible collateral attack on a CAB order; (the District Court did not reach the timeliness question). Plaintiffs appealed and the Court of Appeals for the Second Circuit, to the extent here relevant, reversed, holding that a claim under ADEA was not foreclosed by the CAB order in this case. In addition, the Second Circuit found plaintiffs' ADEA claim to be a "continuing violation," thereby making timely the EEOC charges individual plaintiffs may have filed, on the theory that the mere continued maintenance of an allegedly discriminatory seniority list is *per se* a "continuing violation" of ADEA.

ARGUMENT

I. SO MUCH OF THE DECISION OF THE SECOND CIRCUIT AS CONCLUDED THAT ADOPTION OF A SENIORITY LIST THAT IS ALLEGEDLY AGE DISCRIMINATORY CONSTITUTES A CONTINUING VIOLATION OF THE ADEA AS LONG AS THE LIST IS MAINTAINED SHOULD BE REVIEWED BY THE SUPREME COURT BECAUSE IT DECIDES AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT AS WELL AS OTHER FEDERAL COURTS OF APPEALS.

The integrated seniority list at issue in this case was created in 1981 as the product of a binding process undertaken by the four unions representing Pan Am's pilots and flight engineers that Pan Am accepted, made part of its collective bargaining agreements with the unions, and put into use. The record is

undisputed that, in 1981, shortly after Pan Am accepted the arbitrated seniority system, it posted the new seniority list and, still in 1981, began implementing it: every cockpit assignment determining which individuals hold which of Pan Am's three cockpit positions on which kind of aircraft (which assignment determines monthly pay) and every monthly schedule of flying and of vacations (*i.e.*, who flies where, and when), starting no later than October of 1981, were based on the new seniority list. The record is also clear that, while there were no furloughs under the new list until 1983, had furloughs been necessary in late 1981 or in 1982, those furloughs would have been accomplished under the new seniority list that, from its inception, had put the pilots on notice as to their relative exposure to furloughs. There is also no doubt in the record that the plaintiffs were aware of the new seniority list and its real and potential impact on them; among other things *in 1981* plaintiffs challenged as "unfair and inequitable" in a proceeding before the Civil Aeronautics Board the same portion of the new pilots list they challenge here on essentially the same grounds – the consequences of the "ratio method."

What plaintiffs complain about in this lawsuit, as they complained to the CAB, is their relative position on the new seniority list. They claim, only with respect to that portion of the new seniority list created by a ratio method (which is based on one's relative position on the separate pre-merger seniority lists instead of a direct date of hire or length of service calculation), that they were placed lower on the integrated seniority list than younger pilots (from National Airlines) and that they should be placed higher on that list than those younger (National Airlines) pilots.

Under the ADEA, plaintiffs had, at the most, 300 days from the time the wrongful "employment practice" of which they complain to file discrimination charges with the EEOC (29 U.S.C. §626(d)(2)). As the merged seniority system was put into place, at the latest, by October of 1981, the ADEA would

require an EEOC charge to be filed by August of 1982; none was filed until April of 1983 following the first announcement of lay-offs under the new list, as a result of which three of the plaintiffs came to be furloughed. The Second Circuit concluded that those EEOC charges were timely on the theory that plaintiffs' claim was properly viewed as one attacking the construction of a seniority list and thus a "continuing violation" for as long as that list remains in use. This conclusion, however, is contrary to the reasoning of this Court's decisions in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *United Air Lines, Inc. v. Evans*, 431 U.S. 552 (1977).

In the *United Air Lines v. Evans* case, plaintiff Evans, a flight attendant, charged that United's seniority system illegally discriminated against her in that she was, upon rehire, not given the higher seniority position she "deserved" to make her whole for past sex discrimination. She alleged that United's seniority system constituted a continuing violation of Title VII in that each month her "wages; the duration and timing of vacations; rights to retention in the event of layoffs...and rights to preferential selection of flight assignments" (431 U.S. at 555, n. 5) were affected by her "wrongful" place in the seniority system.

This Court concluded that Evans' claim was time-barred, and not based upon a true continuing violation. The Court found that while the seniority system gave present effect to a past act of discrimination, United

> "was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed ... [T]he emphasis should not be on mere continuity; the critical question is whether any present *violation* exists ..." (431 U.S. at 578-79; emphasis in original.)

Similarly, in *Delaware State College v. Ricks, supra*, 449 U.S. at 258, this Court set out the basic rule for determining *when* a discriminatory practice occurs for purposes of statutes of limitations, stating that "'[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the *consequences* of the acts become most painful,'" quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979), emphasis in original).

Ricks and *United Air Lines v. Evans* should be applied to this ADEA case.* Such application would time-bar this action because the wrongful practice of which plaintiffs really complain is their being placed too low on a seniority list in 1981 (and the other harms plaintiffs allege, including the furloughing of three of them in 1983 that precipitated their EEOC charges, are merely consequences of the putting into use of that list in 1981). Plaintiff's claim is thus not a proper example of "continuing violation."

The Second Circuit's decision here also conflicts with decisions from other circuits to the effect that the continued use of an allegedly erroneously or defectively or discriminatorily constructed employee list does *not* constitute a continuing violation on the analysis that, as in this case, what is continuing is merely the *consequence* of a single, specific, and identifiable past act: the development of a list of employees. See, *e.g.*, *Bronze Shields, Inc. v. N.J. Dept. of Civil Service*, 667 F.2d 1074, 1080-1084 (3d Cir. 1981), *cert. den.* 458 U.S. 1122 (1982) (Title VII) (the "specific, identifiable act, the promulgation of the hiring roster," was the true unlawful practice, not the employment decisions made later on the basis of the roster); *Lockhart v.*

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* While *Ricks* and *United Air Lines v. Evans* were decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000, "the ADEA and Title VII share a common purpose" (and the same limitations period for filing EEOC charges) (*Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 [1979]). See, *e.g.*, *Chardon v. Fernandez*, 454 U.S. 6 (1981), applying *Ricks* to a case arising under 42 U.S.C. §1983.

Firestone Tire & Rubber Co., 454 F.Supp. 191 (E.D. Va. 1978) (ADEA); and more generally, *Benson v. General Motors Corp.*, 716 F.2d 862, 863-864 (11th Cir. 1983) (breach of duty of fair representation claim); *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 592-594 (9th Cir. 1981), *cert. den.* 459 U.S. 1200 (1983) (ADEA); *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1057 (5th Cir. 1979) (Title VII); *Farris v. Board of Ed. of City of St. Louis*, 576 F.2d 765 (8th Cir. 1978) (Title VII);* *contra*, *Morelock v. NCR Corp.*, 586 F.2d 1096 (6th Cir 1978), *cert. den.* 441 U.S. 906 (1979), which, however, appears inconsistent with the Sixth Circuit's later decision in *Trabucco v. Delta Airlines*, 590 F.2d 315 (6th Cir. 1979).

The question of the proper application of the "continuing violation" doctrine to seniority systems under the ADEA is an important one as a matter of both statutory interpretation and public policy. First of all, ADEA was designed to have discrimination claims brought to the attention of an administrative agency within, at the most, three hundred days in order to encourage conciliation and "expeditious disposition" of those claims before they become stale. See, *e.g.*, *Oscar Mayer Co. v. Evans*, *supra*, 441 U.S. at 757. Second, more is at stake in a challenge to a seniority system than the interests of plaintiffs, such as those here, who felt in 1981 *some* impact of a new seniority system but who chose to wait one and a half to two years before filing charges of violation of the ADEA following a *more* serious impact upon them of that seniority system. Under the reasoning of the Second Circuit's decision in this case, *every employee* in a seniority system, and *every employer* with a seniority system, may now never be certain as to the final legality under the ADEA of that system. And an employee may wait *decades* before challenging it, notwithstanding the fact that *that*

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* The Second Circuit's decision concerning timeliness in this case is also neither reconciled with, nor reconcilable with, such earlier cases from the Second Circuit as *Cates v. Trans World Airlines, Inc.*, 561 F.2d 1064 (2d Cir. 1977), and *Bertheas v. Trans World Airlines, Inc.*, 450 F.Supp. 1069 (E.D.N.Y. 1978).

employee knew he had been affected by that seniority system from the time it was first put into use because, among other things, it inevitably affected, from the date of first use, every paycheck and work assignment and his relative exposure to lay-off, whenever that lay-off might occur.

It has long been recognized that many different kinds of seniority systems may be valid (see, *e.g.*, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338-339 [1953]) and that seniority integration following mergers "poses notoriously difficult problems" (*Truck Drivers and Helpers, Local 568 v. N.L.R.B.*, 379 F.2d 137, 140 [D.C. Cir. 1967]). But once a seniority system has been established and, as here, made a part of a collective bargaining agreement, it becomes of paramount importance. "More than any other provision of a collective agreement ... seniority affects the economic security of the individual employee covered by its terms." (Benjamin Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1535 [1962].) And once a seniority system is established, rights and reasonable expectations are created for "perfectly innocent employees" and, of course, for their employers. See, *e.g.*, *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 780-81, 788-89 (1976, Burger, C.J., dissenting in part, and Powell, J., dissenting in part); *Zdanok v. Glidden Co.*, 288 F.2d 99, 104 (2d Cir. 1961), *aff'd sub nom. Glidden Company v. Zdanok*, 370 U.S. 530 (1962).

Employees plan their careers, and employers their corporate destinies, by making some assumptions that seniority systems fix, or at least make predictable, important rights and obligations. The Second Circuit's decision in this case as to the timeliness of plaintiffs' ADEA claims destroys that limited amount of economic predictability in an uncertain world; that decision calls out for review by this Court.

II. SO MUCH OF THE DECISION OF THE SECOND CIRCUIT AS CONCLUDED THAT PLAINTIFFS' ADEA CLAIMS IN THE DISTRICT COURT WERE NOT AN IMPERMISSIBLE COLLATERAL ATTACK ON AN UNAPPEALED ORDER OF THE CIVIL AERONAUTICS BOARD THAT CONCLUDED THAT THE SENIORITY SYSTEM IN DISPUTE HERE HAD BEEN CREATED IN A FAIR AND EQUITABLE MANNER SHOULD BE REVIEWED BY THE SUPREME COURT BECAUSE IT DECIDES AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT AS WELL AS OTHER FEDERAL COURTS OF APPEALS

In Section 408 (b) of the Civil Aeronautics Act of 1938 (then codified at 49 U.S.C. §488(b)), and in its successor statute, Section 408(b) of the Federal Aviation Act of 1958, 49 U.S.C. §1378(b), Congress entrusted to the *exclusive* jurisdiction of the CAB the authority to approve airline mergers "consistent with the public interest" and to regulate those mergers with such terms and conditions "as it shall find to be just and reasonable."* Under this broad mandate of exclusive authority the CAB required Pan Am, as a condition of the CAB's approval of the Pan Am-National Airlines merger, to integrate seniority lists pursuant to the terms of Section 3 of the CAB's Labor Protective Provisions ("LPPs"), which section called for that integration to be accomplished in a "fair and equitable manner."

In light of Section 3 of the CAB's LPPs, plaintiffs, in the form of an organization called PAPF, petitioned the CAB to vacate

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* As a result of the Civil Aeronautics Board Sunset Act of 1984, Public Law 98-443, 98 Stat. 1703, the CAB's merger authority has now been transferred to the Department of Transportation.

the Gill award on the grounds that it did not produce a fair and equitable merged seniority system in that the ratio method portion of the integrated pilots list put some National pilots ahead of some Pan Am pilots with more years of experience; and although the PAPF did not specifically claim that such placement violated *ADEA*, PAPF did bring to the CAB's attention the fact that the Pan Am pilots disadvantaged by the ratio method were older than the National pilots who were advantaged by it. The CAB, after extensive briefing on PAPF's petition (as well as on the petition of another group of pre-merger Pan Am pilots called the "Janus group," which represented pilots who were on furlough, and the petition of some pre-National pilots who sought "enforcement" of the Gill award), sustained the Gill award as being fair and equitable within the meaning of Section 3 of the LPPs. The Federal Aviation Act, at 49 U.S.C. §1486, provides that review of such a CAB order may be had only by appeal to the Court of Appeals, which "shall have *exclusive jurisdiction* to affirm, modify, or set aside the order..." (49 U.S.C. §1486(d), emphasis added); no such appeal was taken.

The exclusive jurisdiction Congress gave the CAB with respect to airline mergers empowered the CAB to reject integrated seniority systems that were not "consistent with the public interest" or not otherwise "just and reasonable" or "fair and equitable." There should be no doubt that a seniority system that was violative of ADEA would be, *per se*, inconsistent with the public interest, and unjust, and the CAB would have a statutory duty to *reject* that seniority system. In light of the exclusive statutory authority vested in the CAB, and the "exclusive jurisdiction" of a Court of Appeals with respect to review of CAB orders, the only further review of that seniority system would be an appeal of the CAB's order to the Court of Appeals; as the District Court concluded below, this action should thus be deemed an impermissible collateral attack on that CAB order. See, for example, *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334-337 (1958), in which this Court observed with respect to a comparable order of the Federal Power Commission:

> "Upon judicial review of the Commission's order, *all objections to the order ... must be made in the Court of Appeals or not at all.* For Congress, acting within its powers, has declared that the Court of Appeals shall have 'exclusive jurisdiction' to review such orders ..." (357 U.S. at 336-37, emphasis added).

Accordingly, a federal district court did not have the subject matter jurisdiction to adjudicate actions such as the one commenced here by plaintiffs (some two years after the CAB issued its order upholding the fairness and equity of the seniority system at issue). See, also *Callanen Road Improvement Co. v. United States*, 345 U.S. 507, 512-513 (1953); *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 381-382 (1922).

While none of this Court's decisions has precisely involved the question of an ADEA claim's being raised after the CAB had passed on the fairness and equity of a seniority system, that precise question was raised and decided in *Carey v. O'Donnell*, 506 F.2d 107 (D.C. Cir. 1974), *cert. den.* 419 U.S. 1110 (1975), a decision the Second Circuit expressly declined to follow. In *Carey*, the court observed:

> "Viewed objectively, the actions below, although couched in terms of violations of the RLA [Railway Labor Act, 45 U.S.C. §151 *et seq.*] and the ADEA, are essentially collateral attacks on the integrated seniority list as incorporated in the ALPA Delta agreement of 26 October, 1972, approved by the Civil Aeronautics Board, and reviewed by this court. We perceive no necessity for additional review, not contemplated by the Federal Aviation Act, in the district court or any other forum." (506 F.2d at 110).

To comparable effect are *Kesinger v. Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973), and *Oling v. Air Line Pilots Ass'n*, 346 F.2d 270 (7th Cir.), *cert. den.* 382 U.S. 926 (1965).

Seniority integration is a complex process, and, almost by definition, no such integration can please everyone subject to it. Nevertheless, the speedy and final integration of seniority lists following a merger is essential so that the merged carrier can operate as a merged carrier rather than as two carriers with a common owner. The CAB had long taken the position that seniority lists must be integrated "as speedily as possible" if the public interest in promoting the adequacy and efficiency of air transportation is to be served. See, *North Atlantic Route Transfer Case (I)*, 12 C.A.B. 124, 133 (1950).

Permitting serial challenges, in various forums, to the fairness and equity of an integrated seniority system would render the *speedy* (and final) determination of post-merger seniority impossible. An airline employee, unhappy with his position on the integrated seniority list, could wait – even if his claim were not deemed to be one of a "continuing violation" – up to *three* years after the list is adopted to sue under, for example, the Age Discrimination in Employment Act (Section 7(e) of the ADEA, 29 U.S.C. §626(e), incorporating Section 6 of the Portal-to-Portal Act, 29 U.S.C. §255) or even up to six years (in New York State) to sue on, for instance, a fraud theory (N.Y. CPLR §213), unless he is *limited* to a challenge to the list heard by the CAB (which procedure of course permits judicial review by a Court of Appeals, 49 U.S.C. §1486). A better way to stymie the statutorily required "public interest" underlying the CAB's approval of an airline merger would be hard to imagine; no airline employee, and no airline, could be confident that a seniority system, approved by the CAB and which they all have lived and planned under for years, may someday be found, retroactively, to be unlawful by someone else. As the court in *Hyland v. United Airlines, Inc.*, 254 F.Supp. 367 (N.D. Ill. 1966), noted: "The parties affected by the CAB merger order cannot be required to answer in different forums at different times on different charges for actions taken under the CAB merger umbrella." *Id.* at 372. The need for speedy (and, inherently, final) integration of seniority lists requires that challenges to an adopted seniority integration scheme, once presented to the CAB, may not be refiled in other guises elsewhere.

The Second Circuit, in permitting *de novo* review under ADEA of essentially the same claims that were raised before the CAB (albeit claims that were not given an explicit ADEA label) misconstrued the primary and exclusive jurisdiction given to the CAB by the Federal Aviation Act to adjudicate the kinds of seniority system claims plaintiffs have already raised before the CAB. *De novo* review, moreover, can only encourage a profusion of wasteful serial litigation on complex matters that are within the competence of the federal agency given the jurisdiction by Congress to resolve such issues. Review of the Second Circuit's decision is thus called for.

Conclusion

For the reasons outlined above a writ of certiorari should issue to review the judgment of the Court of Appeals and, accordingly, this petition should be granted.

November 19, 1985

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 875 — August Term, 1984

(Argued: March 5, 1985 Decided: August 22, 1985)

Docket No. 84-7972

JOHN C. COOK, et al. (listed in Appendices A and B),
Plaintiffs-Appellants,

—against—

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,
Respondents-Appellees.

Before:

MANSFIELD, NEWMAN and KEARSE, *Circuit Judges.*

Appeal from an order of the Southern District of New York, Robert J. Ward, *Judge*, dismissing for lack of subject matter jurisdiction claims of age discrimination, 29 U.S.C. §§ 623-31, and violation of the New York Human Rights Law, N.Y. Exec. Law, §§ 290, *et seq.*, and of the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, based on adoption and implementation of seniority lists for pilots and flight engineers established by consensual arbitration in connection with approval by the Civil Aeronautics Board of a merger of two airlines.

Affirmed in part, reversed in part, and remanded for further proceedings.

JEFFREY C. LONDA, Esq., Houston, TX (Butler & Binion, Houston, TX; Robert E. Cohn, Esq., Kevin F. Flynn, Shaw, Pittman, Potts & Trowbridge, Washington, DC; Jeffrey Bernbach, Esq., New York, NY, of counsel), *for Appellants.*

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ROBERT A. MCCULLOUGH, Esq., Washington, DC (Gary Green, Esq., Air Line Pilots Association, Int'l, Washington, DC, of counsel), *for Appellee Air Line Pilots Association, Int'l.*

ASHER W. SCHWARTZ, Esq., New York, NY (O'Donnell & Schwartz, New York, NY, of counsel), *for Appellees Flight Engineers' International Association, Pan Am Chapter and Flight Engineers' International Association, AFL-CIO.*

MANSFIELD, *Circuit Judge*:

John C. Cook and more than 400 other current or former Pan American Pilot-Flight Engineers, all over age 40, appeal from a judgment of the Southern District of New York, Robert J. Ward, *Judge*, dismissing their complaint against Pan American World Airways, Inc. ("Pan

Am") and four union defendants—Air Line Pilots Association ("ALPA"), International; ALPA, Pan Am Chapter; Flight Engineers' International Association ("FEIA"); FEIA, Pan Am Chapter—for lack of subject matter jurisdiction. Their complaint alleged that, by adopting and implementing a 1981 seniority list integrating the pilots and flight engineers of two merged airlines, Pan Am and National, the defendants had violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623-31 (1982), and New York Human Rights Law ("NYHRL"), N.Y. Exec. Law §§ 290, *et al.* (McKinney 1982 & Supp. 1984-85), and that defendant unions had in addition violated the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1982). Finding that plaintiffs' action constituted an impermissible collateral attack on a final order of the Civil Aeronautics Board ("CAB"), not appealed in accordance with the provisions of § 1006 of the Federal Aviation Act, 49 U.S.C. § 1486(a), Judge Ward dismissed their complaint for lack of subject matter jurisdiction. We affirm in part, reverse in part, and remand for further proceedings.

This case arises out of Pan Am's acquisition of control of and merger with National Airlines, effective January 19, 1980. The merger was approved by the CAB pursuant to 49 U.S.C. § 1378(b), which empowers it to determine whether mergers are "consistent with the public interest" and to approve them "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe". The CAB conditioned its approval of the merger upon compliance with its labor protection provisions ("LPPs"), *see Flying Tiger-Slick Merger Case*, 18 C.A.B. 326 (1954) (approving airline merger but imposing labor protective conditions and retaining jurisdiction), and retained juris-

diction "to make such amendments, modifications, and additions to the labor protective conditions as the circumstances may require. . . ." CAB Order 79-12-164, at 1. Two of the LPPs are central to this case:

> "Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.
>
> * * * * *
>
> "Section 13(a). In the event that any dispute or controversy * * * arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator * * *. The deicsion of the arbitrator shall be final and binding on the parties."

On March 19, 1980, the four unions involved—the ALPA Master Executive Council ("MEC") for the Pan Am pilots, ALPA's MEC for the National Pilots, FEIA's Pan Am Chapter, and FEIA's National Chapter—agreed on a procedure for determining how to integrate the seniority lists. In the event that agreement on seniority integration should not be reached within a limited period arbitration was to be "mandatory," and "[t]he Award of the Arbitrator shall be final and binding as to all flight deck operating crew members and shall be defended by the parties." March 19, 1980, Agreement ¶ 8(j).

After unsuccessful inter-union negotiation and mediation on seniority integration, arbitration took place before Lewis M. Gill, whom the parties had designated as their first choice. The four union representatives participated fully in the arbitration hearing, which lasted approximately 35 days and closed on January 14, 1981. Arbitrator Gill subsequently held 15 days of executive session with the union parties. The final record contained over 4,700 transcript pages and hundreds of exhibits. Arbitrator Gill issued his Award on March 12, 1981.

In his lengthy opinion explaining the award Gill identified several issues. First, the "cross-bidding" arrangements between pilots and flight engineers at Pan Am were entirely different from those at National. Although both airlines required three crewmen in the cockpit, Pan Am used a pilot/flight engineer ("PFE") as the third crewman, while National used an engineer who was not qualified as a pilot. Pan Am accordingly maintained a single seniority list, with PFEs being allowed to bid for pilot vacancies and fall back to engineer positions, bumping less senior PFEs to avoid furlough. National, however, maintained two independent seniority lists, one for its pilots and one for its flight engineers, and did not permit cross-bidding or displacement between the groups.

Having decided not to disturb the premerger cross-bidding situation, Gill constructed two integrated lists. One, the "Pilot List," contained National pilots and all Pan Am airmen; the other, the "Engineer List," contained National engineers and all Pan Am airmen. Gill then directed that cross-bidding be

> "[a]s before on each airline. Pam Am airmen continue cross-bidding practices vis-a-vis each other, but

> Pan Am Pilots cannot bump National Engineers. National Pilots cannot bid Engineer positions, National Engineers cannot bid Pilot positions. National Engineers to have same rights as [a small class of Pan Am engineers who did not qualify as pilots] against being displaced from Engineer seats by Pilots." (Award at IV.C.)

A second issue, labelled "explosive" by Gill, concerned the manner in which approximately 400 Pan Am pilots on furlough at the time of the merger were to be integrated. This large number of furloughees resulted from Pan Am's switch from smaller planes to B747s, the largest wide-bodied aircraft, and Pan Am's poor financial health in the preceding few years. Gill stated that this furlough situation created

> "a head-on clash over the relative equities as between large numbers of National airmen hired between 1968 and 1978 and actively employed at the time of the merger, and large numbers of these Pan Am furloughees with earlier dates of hire who still have recall rights but who brought no active jobs to the merger." (Gill Op. at 8).

Gill's solution was to calculate the Pan Am furloughees' length of service at the time of their recall, and to slot them into the list by comparing their length of service with that of the active airmen at that time. (An exception was made for about 34 furloughed Pan Am pilots who had received notice of recall before January 19, 1980). He indicated a willingness, had the parties (or the "JANUS" group, representing the furloughees) submitted a proposal estimating the likely dates of recall of the furloughees and the likely length of service of the active pilots at those dates, to integrate the furloughees

on that basis. However, no such proposal was forthcoming "[p]erhaps because of the difficulties in fashioning projections of that nature." *Id.* at 41. While noting that his solution to the furloughee problem might seem novel, Gill observed that

> "the problem itself is novel—there has not been any previous merger case called to my attention where such massive numbers of furloughees, with such long periods of being off the property, were pitted against active airmen from the other airline who brought current jobs to the merger." *Id.* at 40.

Finally, differences between Pan Am and National created further conflicts between the interests of the various union groups. While Pan Am's fleet consisted primarily of B747s, National mostly used the smaller B727s. Although National was in "a healthy financial condition at the time of the merger," Pan Am had been in financial difficulties over the preceding few years. Because of these and other differences, the parties before Gill advocated three different methods for integrating the seniority lists: (1) the National pilots and engineers advocated "ratio" methods; (2) the Pan Am pilots a mixed length of service ("LOS") and date of hire ("DOH") method; and (3) the Pan Am engineers a straight DOH method. Under a ratio method, a certain number of identified airmen from one airline are listed followed by a similar listing of a specified number of airmen from the other airline (e.g., 1 National pilot followed by 3 Pan Am pilots). The ratios can form all or part of a master list. In the latter case the balance of the list can name airmen on a LOS and/or DOH basis.

Gill concluded that a "fair and equitable" solution required that two integrated seniority lists be constructed by different methods. He constructed the entire En-

gineer List, and the top and bottom of the Pilot list, by a straight LOS/DOH method. However, for the middle portion of the Pilot List he used a mixed-ratio method, which distributed Pan Am and National pilots in a ratio of approximately 3.25 Pan Am pilots for every one National pilot.

On March 15, 1981, ALPA mailed copies of the arbitrator's award to all the pilots and on March 25, 1981, FEIA mailed copies to the flight-engineers. On June 26, 1981 Pan American accepted the Gill award and agreed to implement it without change.

Two groups of airmen petitioned the CAB to set aside the Gill award. The Janus Group, formed at the time of approval proceedings before the CAB and representing 510 Pan Am crewmen who had been furloughed before the merger, maintained that the Gill award failed adequately to consider the interests of its members and that it was not "fair and equitable" within the meaning of the labor protection provision of CAB Order 79-12-164, at 1. The Janus Group sought a new arbitration in which it would be granted full party status.

Pan American Pilots Fighting ("PAPF"), a group of Pan American crewmen who had been employed from dates before the merger, which was formed after the arbitration award to oppose it, argued that the Gill award must be set aside because it used a ratio method to integrate the middle portion of the Pilot List. PAPF maintained that only a "time served" method of integration, either LOS or DOH, was "fair and equitable" and that use of a ratio method was inconsistent with the labor protective provisions that the CAB had imposed in approving the merger. PAPF sought a CAB order integrating the seniority list on a time served basis or renegotiation of the integration with PAPF and the Janus Group as parties.

The CAB rejected the two petitions in an order dated April 15, 1982, noting:

> "The carrier's action is wholly consistent with our long-held, and judicially approved, view that 'absent a showing of bad faith, the adoption by a carrier of an integrated seniority list proposed by the collective bargaining representatives of the employees involved amounts to the carrier having made "provisions * * * for the integration of seniority lists in a fair and equitable manner" within the meaning of section 3 of the Board's labor protective provisions.'[13] It follows, therefore, that we also dismiss Janus Group's and PAPF's petitions to set aside the award.

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[13] *Delta-Northeast Merger Case*, Order 73-1-24 at 5, *aff'd Northeast Master Executive Council* v. *CAB*, 506 F.2d 97 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110."

CAB Order 82-4-75 at 11.[1] Having concluded that resolution of the seniority integration was reached in a fair and equitable manner, the Board declined to review "the intrinsic nature of the integration system established by the award." *Id.*

The CAB further found that the Janus Group was not entitled to full party status at a new arbitration since its members' interests were adequately represented both by its own statements at several points during the arbitration and by union representation at all stages. It also rejected PAPF's claim that only a "time-served," i.e., LOS or DOH, method of integration was "fair and equitable", finding that Arbitrator Gill acted within his prerogative in using a ratio method to integrate the middle

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[1] The CAB also dismissed a "Motion for Confirmation and Enforcement of [the] Arbitration Award," filed by flight engineers formerly employed by National, as moot.

portion of the Pilot List. In making this finding, the Board again confirmed the propriety of its refusing " 'to look behind the freely negotiated list.' " *Id.* at 12 (quoting *Northeast Master Executive Council* v. *C.A.B.*, 506 F.2d 97, 105 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975)). No appeal was taken from the CAB's denial of the two petitions, even though an appeal was available under 49 U.S.C. § 1486, which provides in relevant part that "any" order of the Board "shall be subject to review by the courts of appeals of the United States" which "shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. . . ." 49 U.S.C. §§ 1486(a), (d). The statute further provides that the Board's findings, if supported by substantial evidence, shall be conclusive, 49 U.S.C. § 1486(e).[2]

The complaint in the present action, which was filed on March 7, 1984, alleged that plaintiffs were all over

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[2] We have held that for purposes of review under 29 U.S.C. § 1486(a) the word "order" should be construed liberally. *State of New York* v. *F.A.A.*, 712 F.2d 806, 808 (2d Cir. 1983). Although only final orders are reviewable, *McManus* v. *C.A.B.*, 286 F.2d 414, 417 (2d Cir.), *cert. denied*, 366 U.S. 918 (1961), we have defined a final order as one which "imposes an obligation, denies a right, or fixes some legal relationship." *Rombough* v. *F.A.A.*, 594 F.2d 893, 895-96 n.4 (2d Cir. 1979) (citing *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 112-13 (1948)). The order in the instant case meets this criterion.

Our conclusion that the CAB order denying the petitions to set aside (rather than the original CAB order approving the merger but retaining jurisdiction to ensure that the LPPs are complied with) is appealable, *see, e.g.*, *Northeast Master Executive Council* v. *C.A.B.*, *supra*, 506 F.2d at 100, and consistent with cases in which we have held orders approving a merger to be non-reviewable, *Overseas National Airways, Inc.* v. *C.A.B.*, 426 F.2d 725, 727 (2d Cir. 1970) (CAB orders refusing to expand scope of hearing non-reviewable as merely "threshold determinations," "interlocutory in nature"); *McManus* v. *C.A.B.*, *supra*, (CAB orders "relating to various procedural details" not subject to review).

age 40 and that many had, in the period April 12, 1983 to September 2, 1983, filed in various federal and state equal employment offices charges containing some or all of the allegations stated in the complaint. The complaint charged that the pilot seniority list resulting from the Gill arbitration award, which used a ratio formula "to insert large numbers of former National pilots under age 40 ahead of older and more experienced Pan Am pilots over the age of 40," ¶ 11, was first implemented on a system-wide basis on March 28, 1983, and that it had been and would continue indefinitely to be implemented. Further, the complaint maintained that on June 15, 1983, Pan Am had caused to be furloughed, under the Gill seniority integration, three of the plaintiffs.

The complaint further alleged that "[b]y using and adopting, and by indefinitely continuing to use and adopt, the above-described seniority system in making employment decisions" defendant Pan Am has engaged in "willful and continuous violation" of both § 4(a) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a), and § 296 of the New York Human Rights Law, N.Y. Exec. Law § 296; and that the four defendant unions, "[b]y actively supporting and/or acquiescing in, and by indefinitely continuing to actively support and/or acquiesce in, the above-described seniority system," had engaged in "willful and continuous violation" of § 4(c) of the ADEA, 29 U.S.C. § 623(c), and § 296 of the New York Human Rights Law, and that they had thereby breached their duty under the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, to fairly represent the interests of the plaintiffs. Plaintiffs sought injunctive relief, including an order directing defendants to construct and implement a seniority system which eradicated the effects of the allegedly unlawful employment practices described;

damages to make them whole; liquidated damages; and attorneys' fees and costs.

Pan Am sought dismissal of the complaint on the grounds that the ADEA cause of action was time-barred and that the pendent claim should be dismissed for lack of jurisdiction. ALPA and FEIA also moved for dismissal on the grounds that plaintiffs' ADEA and duty of fair representation claims were time-barred and that the complaint constituted an impermissible collateral attack on a final order of the CAB.

At the end of a hearing held on October 31, 1984, Judge Ward issued an oral opinion and an order dismissing plaintiffs' complaint on the ground that it constituted an impermissible collateral attack on a final order of the CAB that had not been appealed in accordance with the provisions of § 1006 of the Federal Aviation Act, 49 U.S.C. § 1486(a). This appeal followed.

DISCUSSION

The principal issue is whether the integrated seniority list formulated by the parties' mutually-selected arbitrator pursuant to the CAB's labor protection provisions may, notwithstanding the CAB decision, be challenged through the present lawsuit on the ground that it violates plaintiffs' rights under the ADEA and the New York Human Rights Law. The starting point for consideration of that issue lies in Supreme Court decisions upholding *de novo* judicial determination of claims asserted under similar federal statutes, *McDonald* v. *City of West Branch*, — U.S. —, 104 S.Ct. 1799 (1984) (civil rights claim under 42 U.S.C. § 1983); *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (Minimum wage provisions of Fair Labor Standards Act); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII

action). *Gardner-Denver* has particular relevance for the reason that the prohibitions of the ADEA, enacted only a few years after Title VII, are in terms almost identical to those of Title VII, *Hodgson* v. *First Fed. Sav. & Loan Ass'n*, 455 F.2d 818, 820 (5th Cir. 1972), and both laws have received parallel interpretations. *Aronsen* v. *Crown Zellerbach*, 662 F.2d 584, 589 (9th Cir. 1981), *cert. denied*, 459 U.S. 1200 (1983). *See also Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756-58 (1979).

In *Gardner-Denver*, *supra*, the Supreme Court unanimously held that, since Congress intended to give federal courts parallel jurisdiction over a *de novo* proceeding, an employee's statutory right under Title VII to obtain judicial relief from discrimination in his employment is absolute and not barred or waived by his resort to the grievance-arbitration machinery of a collective-bargaining agreement. Congress, said the Court, intended

> "to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." *Id.*, at 48-49.

The Court noted, as reasons for its decision, that the arbitrator's role was "to effectuate the intent of the parties rather than the requirements of enacted legislation," *id.* at 56-57, that the arbitrator's competence "pertains primarily to the law of the shop, not the law of the land," *id.* at 57, that the record of arbitration is usually

not as complete as that of a court proceeding, that the rights and procedures common to civil trials are often limited or unavailable and that arbitrators have no obligation to give their reasons for an award. These reasons were echoed and adopted in *McDonald* in support of the Court's holding that a federal court may not, in a civil rights action under 42 U.S.C. § 1983, give preclusive effect to an arbitration award, concluding that arbitration is not the equivalent of a "judicial proceeding" within the meaning of 28 U.S.C. § 1738. 104 S.Ct. at 1804.

Some of the Supreme Court's reasoning may not be as fully applicable to the arbitration proceeding in the present case as it was in *Gardner-Denver* and *McDonald*. For instance, the fairness of integrated seniority may have been resolved by the arbitrator consistently with the aims of ADEA. But we are persuaded that this difference in shading is not of sufficient significance to outweigh the statutory entitlement to the *de novo* determination provided for by Congress in its enactment of ADEA.

There remains, therefore, the question of whether, since Arbitrator Gill's order was appealed as of right to the CAB by way of a motion to set it aside and the CAB's resulting order was in turn appealable to a court of appeals, vested by statute with "exclusive jurisdiction" to hear such appeals, the principles of *Gardner-Denver* and *McDonald* still apply or whether the order of the CAB must be given collateral estoppel or preclusive effect. The answer turns largely on whether the issue before the administrative agency, in this case the CAB, was the same as that raised in the later court proceedings and whether the administrative agency had the authority to decide that issue. In *City of Tacoma* v. *Taxpayers*, 357 U.S. 320 (1959), relied on by the district court, collateral attack was barred when the issue raised by the State of

Washington in a proceeding before the state court, the legality and effect of a license issued by the Federal Power Commission, was the same as that raised by it earlier before the Commission itself, which was fully competent to resolve the issue, and was decided upon appeal by the Court of Appeals, which had "exclusive jurisdiction" to review the Commission's order. In *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377 (1922), also cited by the district court, collateral attack upon an order of the Interstate Commerce Commission was barred since the issue raised in the later court proceeding was one which the ICC was explicitly empowered to decide.

On the other hand, when the administrative agency is neither authorized nor required to decide the issue later raised in a separate action, the court has jurisdiction to entertain the latter claim. In *Beins* v. *United States*, 695 F.2d 591 (D.C. Cir. 1982), for instance, the court upheld the district court's jurisdiction to entertain a pilot's claim under the Federal Tort Claims Act against the government for damages based on alleged negligence of the Federal Aviation Commission. The government's contention that the plaintiff's sole remedy was an appeal to a court of appeals of the FAA's denial of medical certification was rejected on the ground that the determinations made by a court of appeals "are distinct conceptually from a finding of negligence." *Id.* at 598.

Applying these principles here, the record does not reveal any CAB ruling on the question now raised by the plaintiffs of whether the integrated seniority lists formulated by Arbitrator Gill were unfair as age-discriminatory. The CAB made no independent inquiry into possible age discrimination and held no evidentiary hearing. Indeed, none of the parties presented an issue based on age

discrimination to the Board. In opposition to a motion by National Flight Engineers to confirm the award and in support of motions to set it aside, the Janus Group and PAPF argued only that their interests had not been adequately considered by the arbitrator, and that the ratio method used for part of the arbitrator's integrated seniority lists, in contrast to "time served" methods (DOH and LOS), was not a fair and equitable basis for integration.

Nor did the CAB indicate that it would have considered itself authorized to rule upon such an issue (unfairness based on age discrimination) if it had been raised. On the contrary, although it reviewed in detail Arbitrator Gill's 59-page decision, it repeatedly made clear that it considered its authority limited to deciding whether the arbitration had been conducted "in a fair and equitable *manner*" (LPP § 3; emphasis added), i.e., as a procedural matter, rather than whether the terms of the award were substantively equitable. In short, it focused its attention on the procedures used by the parties to negotiate the seniority integration issue, to arrive at terms for arbitration of the issue when the negotiation failed, and to assure fair representation of union members in the arbitration itself.

> "Our authority, however, over arbitration voluntarily undertaken by employee representatives in connection with a Board-approved acquisition or merger is confined to examining whether the arbitration was fairly and equitably conducted." CAB Order 82-4-75, at 3.

The Board's limited review of the merger (of seniority lists) claimed to have violated § 3 of the LPPs is consistent with the limited jurisdiction over labor matters conferred upon it by 49 U.S.C. § 1378(b) and with the Board's own interpretation of the scope of that jurisdic-

tion, which is entitled to considerable weight. *See, e.g., Youakim* v. *Miller*, 425 U.S. 231, 235 (1976) ("The interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute."); *Manchester Environmental Coalition* v. *E.P.A.*, 612 F.2d 56, 59 (2d Cir. 1974). As the Board has noted, despite its imposition of the LPPs,

> "it has been the Board's longstanding policy that the matters encompassed herein should be resolved by voluntary agreement between the carrier and the labor groups or employees involved or, failing agreement, by arbitration. This policy with respect to seniority integration is reflected in sections 3 and 13 of the labor protective conditions." *American-Trans Caribbean Merger*, 57 C.A.B. 581, 585 (1971), *aff'd sub nom. American Airlines* v. *C.A.B.*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972). (Footnotes omitted).

The purpose and scope of the LPPs is extremely limited:

> "[W]e have characterized LPP's as 'an extraordinary intervention . . . into the employer-employee relationship.' . . . [W]e have repeatedly refused to become entangled in carrier-employee labor disputes, because our jurisdiction is limited, we lack expertise in labor relations, and there are better equipped, more competent forums available to handle labor disputes. Moreover, it is important to recognize that the primary intent of the Board's LPP's historically has been to prevent disruptions in the national air transportation system. Their purpose has not been to benefit carrier employees directly, or to avoid labor unrest with particular air carriers." *Texas International-Continental Acquisition Case*, CAB Order 81-10-66, at 11 (footnotes omitted).

In implementation of its limited authority the Board will scrutinize a freely-negotiated integrated seniority list "only on a showing of bad faith, or deliberate attempt to subvert the Board's order, or other compelling circumstances," *Delta-C&S Seniority List*, 29 C.A.B. 1347, 1349 (1959), *aff'd sub nom. Outland* v. *C.A.B.*, 284 F.2d 224 (D.C. Cir. 1960). The Board will not find § 3 of the LPP's satisfied unless it determines that the groups of employees affected have been adequately represented in formulating the list.

With these exceptions, which go to the "manner" in which the arbitration was conducted, the CAB leaves the resolution of all other issues to the parties or their mutually-selected arbitrator. Indeed, the CAB has acknowledged that a finding by it that seniority lists have been integrated "in a fair and equitable manner" does not necessarily bar petitioners from challenging the legality of the lists themselves in court. In *Delta-C&S Seniority List*, *supra*, 29 C.A.B. at 1350, it stated (after rejecting petitioners' claim that the merged list was not fair and equitable), "[w]e take no position on whether petitioners have a cause of action cognizable by the courts." *See also Pan Am-TWA Route Exchange Agreement*, CAB Order No. 80-6-95, at 4 ("We will not . . . review the merits of a challenged [seniority integration list] award, the merits including questions of law and questions of fact."). In a case in which petitioner charged that he had been subjected to age discrimination and sought damages, the CAB explicitly stated that "[a]ge discrimination is outside the scope of the LPP's." *Caribbean-Atlantic Airlines, Inc.-Eastern Air Lines, Inc., Acquisition Case*, CAB Order 80-10-65, at 2.

Thus, because of the ADEA's statutory grant of *de novo* review and the CAB's lack of authority to adjudicate

the age-discrimination issue later raised in the present action, this action is not barred by reason of the collateral attack doctrine. Our conclusion that the district court has jurisdiction to consider the ADEA claims is not inconsistent with the principal authorities relied on by Judge Ward. For reasons already noted, *City of Tacoma*, *supra*, and *Lambert Run Coal Co.*, *supra*, are clearly distinguishable. No ADEA, Title VII or similar claims were asserted in *Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973), and *Oling* v. *Air Line Pilots Ass'n*, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965). Those two decisions did not rule upon the substantive fairness of integrated seniority lists but on whether the unions had breached their duty of fair representation before the CAB, an issue over which the CAB has jurisdiction because it bears directly on whether the lists were arrived at in a fair and equitable "manner" as provided for by LPP § 3. But even if the CAB's authority were enlarged to permit it to rule on the substantive fairness of the integrated seniority lists, we believe, for the reasons already stated, that plaintiffs would not be precluded from obtaining a *de novo* federal court review of that issue. *Gardner-Denver*, *supra*; *McDonald*, *supra*.

We find ourselves unable, for the reasons already indicated, to follow the District of Columbia Circuit's decision in *Carey* v. *O'Donnell*, 506 F.2d 107 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975), upon which Judge Ward relied. The court there held that the district court lacked jurisdiction over plaintiffs' claim that the defendants had violated the ADEA, in view of the court's approval on the same day, in *Northeast Master Executive Council* v. *C.A.B.*, 506 F.2d 97, *cert. denied*, 419 U.S. 1110 (1975), of the Board's dismissal of petitions alleging that the underlying integration of seniority lists had not

been arrived at in a "fair and equitable manner." The D.C. Circuit purported to rely on the rationales expressed in *Kesinger, supra,* and *Oling, supra,* which are clearly distinguishable for the reasons we have noted above. Moreover, it did not analyze the claims before the district court, the limited authority of the CAB, and the right to a *de novo* trial of ADEA claims, but merely stated in conclusory fashion that the action amounted to a collateral attack on the seniority lists approved by the Board.

Our holding that federal jurisdiction exists over plaintiffs' ADEA claims is not intended to imply that the claims have merit or that plaintiffs will have the right to reopen the integrated seniority lists formulated by the parties' mutually selected arbitrator. Although the complaint's allegations of "willful and continuous violation of Section 4(a) of the ADEA" (Compl. ¶¶ 14, 16) at first blush appear to sound in terms of discriminatory intent with respect to each of the plaintiffs, this case is governed by § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2). That section insulates an employer or labor organization from ADEA liability for observing the terms of a "bona fide seniority system . . . which is not a subterfuge to evade the purposes" of the ADEA.

The criterion for determining whether a seniority system is a "bona fide" one is stated in the pertinent regulation issued under the Act, 29 C.F.R. § 1625.9(a) (1984), which provides that "[t]hough a seniority system may be qualified by such factors as merit, capacity, or ability, any bona fide seniority system must be based on length of service as the primary criterion . . .". Since the merged list uses length of service at the top and bottom ends of the list and uses length of service combined with a ratio between the two former lists for the middle of the merged list, it would appear to satisfy the test that length of service be the "primary criterion."

With respect to the requirement that a seniority system not be a "subterfuge," a term that implies discriminatory or evasive intent, as in § 703(h) of the Civil Rights Act, 42 U.S.C. § 2000(e)-2(h), *see American Tobacco* v. *Patterson*, 456 U.S. 63, 64-65 (1982), the same regulation states that "a purported seniority system which gives those with longer service lesser rights . . . may, depending on the circumstances, be a 'subterfuge to evade the purposes' of the Act." *Id.* at § 1625.8(b). Among the circumstances to be considered in this case are the validity of the reasons advanced by the unions for the use of a ratio method in the middle of the list, as well as the validity of plaintiffs' claim that defendants have engaged in "willful" discrimination.

The mere fact that plaintiffs would have fared better under a different scheme does not show that the merged seniority list is a "subterfuge" to evade the ADEA, especially in view of the distinction that must be drawn between age and seniority, in the absence of any evidence in the present record that the union representatives acted in bad faith or with an age-discriminatory motive in arriving at a compromise, or that Pan Am so acted in accepting and implementing it. That compromise recognized that a straight "time served" method would discriminate unfairly in favor of a large number of furloughed Pan Am pilots against actively employed National pilots bringing jobs with them to the merger, and it therefore adopted a ratio method for the middle portion of the integrated seniority list. As the CAB observed:

> "Arbitrator Gill was faced with totally opposed positions for the integration of the seniority lists, and the parties were fully permitted to develop their cases supporting their separate positions in a record involving over 4,700 transcript pages and hundreds

of exhibits. In the end the arbitrator did what most arbitrators do—he picked parts of the different positions and made compromises to arrive at what he believed was an equitable result. There is no way, given the sharply divergent and contested positions of the parties, that the arbitrator could ever reach a result that was fully acceptable to all parties—to say nothing of the individual pilots and flight engineers whose interests were represented in the proceeding. That is an inevitable result of arbitration. The fact that dissatisfaction remains is no basis for requiring another seniority integration." CAB Order 82-4-75, at 13.

Plaintiffs' claim that the defendant unions violated their duty of fair representation in the CAB proceeding stands on an entirely different footing from plaintiffs' ADEA claim. To make out this claim plaintiffs must prove that the "union's conduct toward a member of the collective bargaining unit [was] arbitrary, discriminatory, or in bad faith." *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967). Subsequent interpretations have established that proof of mere negligence or errors of judgment on the part of the union is insufficient.

> "To succeed [in a suit for violation of the duty of fair representation] under § 301 [of the Labor Management Relations Act, 29 U.S.C. § 185], an employee must show 'substantial evidence of fraud, deceitful action or dishonest conduct,' . . . 'hostile discrimination,' . . . arbitrariness or irrationality, . . . , or conduct in bad faith. . . .
>
> "As long as the union acts in good faith, courts cannot intercede on behalf of employees who may be prejudiced by rationally founded decisions which operate to their particular advantage." (Citations

omitted). *Capobianco* v. *Brink's Inc.*, 543 F. Supp. 971, 975 (E.D.N.Y. 1982), *aff'd mem.*, 722 F.2d 727 (2d Cir. 1983).

The CAB's statutory authority under 49 U.S.C. § 1486(a), as amplified by § 3 of the LPPs, requires it, in order to rule upon whether seniority lists have been integrated in a "fair and equitable manner," to determine whether the unions involved have fairly represented their members in the negotiations and ensuing arbitration proceedings. Moreover, the CAB did just that in the present case. The Board found, as had Arbitrator Gill, that the interests of all the employee groups had been vigorously represented throughout the proceedings and that neither the Janus Group nor PAPF had shown a violation of the unions' duty of fair representation:

> "Neither group, both formed to forward the views of some Pan Am furloughees and pilots, respectively, who were otherwise represented in the intra-union arbitration by Pan Am Engineers and Pan Am pilots, has shown that these union representatives breached their duty of fair representation. The record before us amply demonstrates that all union parties vigorously advocated positions on seniority integration advantageous to their members. Janus Group, in addition, appeared in the arbitration to express, directly to Arbitrator Gill, its position for furloughees. To the extent that some of the parties failed to prevail in the substance of their views, and hence occasioned disappointment for certain furloughees and pilots, that is not grounds for our review of the intrinsic nature of the integration system established by the award. It is well-settled that the Board properly 'decline[s] to review and to enter judgment on the merits of * * * [union representatives'] negotiated

> resolution of * * * [an internal union] seniority dispute arising out of a merger' if satisfied 'that the resolution was reached in a fair and equitable manner.' Here, the record shows that the labor parties adopted fair and equitable procedures—four-way negotiation, mediation, and final and binding arbitration—to resolve their differences on merged seniority; and that the procedures were faithfully carried out—even to the unanimous selection of an eminent arbitrator in airline seniority matters." CAB Order 82-4-75, at 11 (footnote omitted).

Since the CAB is empowered to and did resolve the fair representation claim, and since plaintiffs are not entitled to *de novo* adjudication by a district court of that claim, the district court's dismissal of the claim as an impermissible collateral attack on the CAB's final order is affirmed.

Appellees next contend that the district court's dismissal of the action should be affirmed on the ground that appellants' ADEA claim is time-barred for failure to file charges with the EEOC within the required 300 days after "the alleged unlawful employment practice occurred". 29 U.S.C. § 626(d)(2). This requires us to "identify precisely the 'unlawful employment practice' of which [the plaintiff] complains." *Delaware State College* v. *Ricks*, 449 U.S. 250, 257 (1980). Appellees argue that the unlawful practice here occurred in September 1981 when the Gill arbitration award was filed and published by Pan Am, more than 300 days before plaintiffs' filing of their ADEA charges with EEOC. Plaintiffs, on the other hand, contend that the crucial event for ADEA time-bar purposes did not occur until March 28, 1983, when Pan Am first implemented the alleged discriminatory seniority lists by making assignments in accordance

with them, as alleged in Par. 12 of their complaint, and that their claim did not accrue until that time, which was within 300 days prior to the filing of their ADEA charges with the EEOC. Moreover, plaintiffs argue, even assuming their claim first accrued in 1981, the violation was a continuing one, thereby making timely their filing of EEOC charges, and the implementation of the seniority system was not a mere consequence or manifestation of the earlier conduct. *See Chardon* v. *Fernandez*, 454 U.S. 6, 8 (1981).

We have recently held that "[w]hen employees are hired or refused employment pursuant to a continuous practice and policy of discrimination, the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it, *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport*, 647 F.2d 256, 274 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982), provided such a continuing violation is clearly asserted both in the EEOC filing and in the complaint."[3] *Miller* v. *I.T.&T.*, 755 F.2d 20, 25 (2d Cir. 1985). In *Moreland* v. *NCR Corp.*, 586 F.2d 1096, 1103 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979), for instance, the court held that "adoption of a seniority system, if discriminatory as to age, constitutes a continuing violation of the ADEA as long as that system is maintained by the employer." *See also E.E.O.C.* v. *Home Ins. Co.*, 553 F. Supp. 704 (S.D.N.Y. 1982); *but cf. Bronze Shields, Inc.* v. *N.J. Dept. of Civil Service*, 667 F.2d 1074 (3d Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982). Applying these principles here, we hold that the alleged discriminatory violations in the present case must

[3] At the request of the court, plaintiffs have submitted copies of charges filed with the EEOC in which plaintiffs clearly assert ongoing violations of the ADEA. The complaint also alleges ongoing violations. *See* ¶¶ 14-18.

be classified as continuous ones, giving rise to claims accruing in favor of each plaintiff on each occasion when the merged seniority list was applied to him, provided he filed such charges with the EEOC, which he would be required to establish on remand, *Miller* v. *I.T.T.*, *supra*, 755 F.2d at 25.

Appellants' final contention, that appellees should be estopped from asserting the ADEA time-bar defense, needs little discussion. In *Price* v. *Litton Business Systems, Inc.*, 694 F.2d 963, 965 (4th Cir. 1982), the court refused to find estoppel in the absence of a finding that the failure to make a timely filing was in consequence "either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge." *Accord Kriegsmann* v. *Barry-Wehmiller Co.*, 739 F.2d 357, 359 (8th Cir.), *cert. denied*, 105 S.Ct. 512 (1984). *See also Pfister* v. *Allied Corp.*, 539 F. Supp. 224, 227 (S.D.N.Y. 1982) (no estoppel where "no allegation that the defendant acted in bad faith or deceitfully lured the plaintiff into settlement discussions, or that it attempted in any way to cause the plaintiff to miss the appropriate filing date").

Appellants here have not satisfied their burden on this issue. They make no estoppel argument against Pan Am. Against the defendant unions, they fail to allege detrimental reliance on any union representations. Nor could they do so, in view of Pan Am's posting of the seniority lists in March 1981 and the retention by PAPF in May 1981 of the same law firm that currently represents plaintiffs.

The order of the district court is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion.

APPENDIX A

PLAINTIFFS WHO FILED CHARGES WITH E.E.O.C. OR STATE AGENCY

NAME	ADDRESS	CITY	ST	ZIP
AINSWORTH JR	9365 S. Spencer	Las Vegas	NV	89123
ALEXANDER DB	18 Birchwood Lane	Ramsey	NJ	07446
BANDY JM	7 Merwin Bk. Rd.	Brookfield Ctr.	CT	06805
BARNES KE	2244 Nightingale Dr.	Santa Rosa	CA	95401
BENTON, JE	Rt. 9, Box 275	Goldsboro	NC	27530
BERGAD JR	P.O. Box [illegible]5	Torrington	CT	06790
BILLINGS MX	641 S. Rivershire Dr.	Conroe	TX	77304
BLEDSOE RP	P.O. Box 427	Cockeysville	MD	21030
BOLING JR	52 Squires Rd.	Madison	CT	06443
BOWLES ME	Rte. 6, Box 168A	Charlottesville	VA	22901
BROWN JM	204 E. Deer Park Dr.	Gaithersburg	MD	20877
BURMASTER RA	Rte. 1, Box 349 E	Leesburg	VA	22075
CAMPBELL JD	3718 Divisadero St.	San Francisco	CA	94123
CARDINAL DP	552 Pinelawn Ave.	Belleair	FL	33516
CLARKE FR	19 Viejo Way	Novato	CA	94947
COOK JC	76 Davenport Dr.	Stamford	CT	06902
COOL CE	Box 151	Henderson Harbor	NY	13651
CORY DC	RD 2	Frenchtown	NJ	08825
DAHONEY TG	129 Clapp Road	Scituate	MA	02066
DAVIS MK	4908 Overview Dr. Apt. 1212	Arlington	TX	76017
DELAVAN WP	67 Highpoint Dr.	Gulf Breeze	FL	32561
DONNELLY WJ	15601 SW 83rd Ave.	Miami	FL	33157
DURANT RJ	106 Hessian Hill Dr.	Pennington	NJ	08534
EAGER CE	103 Lincklaen St.	Cazenovia	NY	13035
ECKEL R	P.O. Box 30664 JFK Airport	Jamaica	NY	11430
ENDRESEN DA	Box 45 Botsford Hill Rd.	Roxbury	CT	06783
FINLEY CB	P.O. Box 7671	Woodlands	TX	77387
FRAGA RM	1540 Mancha Dr.	Boulder City	NV	89005
FRANK RK	Box 615	Shelter Island	NY	11964
FREEMAN CE	7747 Carrleigh Pkwy.	Springfield	VA	22152
GAUTHIER RW	3322 Cowper St.	Palo Alto	CA	94306
GRAY JE	RFD 1, Box 186	Bethlehem	CT	06751
GREEN JG	498 Scotts Lndg. Rd.	Southampton	NY	11968
GRISEL GR	7475 Estrella Cir.	Boca Raton	FL	33433
HALL RH	P.O. Box KK	Wellfleet	MA	02667
HAMMES PL	24 Governors Lane	Bethel	CT	06801
HANDLEY FK	2519 Manhattan Ave.	Manhattan Beach	CA	90266
HANSEL KA	P.O. Box 4021	Burlingame	CA	94011
HARGIS RO	225 Montalvo Rd.	Redwood City	CA	94062

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NAME	ADDRESS	CITY	ST	ZIP
HERNDON WK	42 Crest Dr.	Little Silver	NJ	07739
HOWE JG	P.O. Box 101	Greendell	NJ	07839
HUBBARD DG	5926 S. 73rd E Ave.	Tulsa	OK	74145
JARBOE RL	318 Lake June Dr.	Lake Placid	FL	33852
KAWAMOTO DK	6850 Glenview Dr.	San Jose	CA	95120
KELLEY RC	483 NW 105th Dr.	Coral Springs	FL	33065
KIRKMAN JD	2303 E. 2nd St. #3	Bloomington	IN	47401
KLAU DA	15 Pond Side Lane	West Simsbury	CT	06092
KORCHECK SM	1480 Coronet Dr.	Reno	NV	89509
LEE WR	2106 Oriole CT	Fairfield	CA	94533
LOCHER AH	151 Clapboard Ridge	Danbury	CT	06810
LUDWIN RJ	RR 1 North Rd.	New Milford	CT	06776
LYNCH EJ	3002 Yorkshire Rd.	Doylestown	PA	18901
MALO ME	11500 Fairway Dr. #507	Reston	VA	22090
MANIOUDAKIS EX	RD 3 Box 372	Somerset	NJ	08873
MARKHAM DA	7411 N.W. 8th Court	Plantation	FL	33317
MATEI MM	1913 Kenilworth Ct.	Toms River	NJ	08753
MAYO DQ	Rte. 2 Box 85, Sunset Dr.	Ottsville	PA	18942
MCAULEY GH	928 Peninsula Ave #409	San Mateo	CA	94401
MCGRORY RC	501 East Mill Road	Flourtown	PA	19031
MCVAY PR	Route 1 Box 63	Roxbury	CT	06783
MEIXSELL CF	202 Summer Ave.	Horsham	PA	19044
MILLER JW	15 Greta Dr.	Danbury	CT	06810
MOON EE	745 Windward Rd.	Jackson	MS	39206
MURPHY BP	5900 Sarah Ct.	Austin	TX	78731
NORDMAN VJ	5109 Green Acres Ct.	Metairie	LA	70003
O'BRIEN WJ	73 Princess Anne Ct	Warrenton	VA	22186
O'NEILL RF	474 Pepperwood Ct.	Marco Island	FL	33937
OBER RI	3 Thornwood Ct.	Setauket	NY	11733
OLESEK FW	9421 SW 147th St.	Miami	FL	33176
PARRISH BP	2970 Avalon Ave.	Berkeley	CA	94705
PAUL RV	8800 SW 123d Ct., J-203	Miami	FL	33186
PERRY RA	1152 St. John Place	Santa Ana	CA	92705
PICKEN WR	48 Big Oak Lane	Stamford	CT	06903
PLATTE CR	83 Kellogg Dr.	Wilton	CT	06897
POST RR	Route 1 Box 357	Newport	WA	99156
RAHISER WS	P.O. Box 306	Branford	CT	06405
RENNINGS AA	Box 124 RD #2, Jonestown Rd.	Oxford	NJ	07863
SALKOVICS AJ	3144 Goldenspur	Camarillo	CA	93010
SCHWAB EA	2615 Majestic Dr.	Wilmington	DE	19810
SHEPARD HE	38 Jenkins Rd.	Franklin	NJ	07416
SLOAN GC	521 Altivo Ave.	Watsonville	CA	95076
STANNARD LA	129 Newton Ave.	Norwalk	CT	06851
TAUBERT AR	Rte. 3, Foxrun Lane S	Newtown	CT	06470

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NAME	ADDRESS	CITY	ST	ZIP
UGIANSKIS RX	PO Box 16, Candlewood Isle	New Fairfield	CT	06812
VAN WYK PD	68 New Garden Ave.	Lancaster	PA	17603
WARREN VF	P.O. Box 579	Carnelian Bay	CA	95711
WEAVER RH	1533 Sopera Ave.	Coral Gables	FL	33134
WENK PJ	52 Wellsweet Dr.	Madison	CT	06443
WILDER JB	251 Hickory Lane	Roxbury	CT	06783
WILLEUMIER RC	618 Hill Street	Barrington	IL	60010
WIRKKI TK	Box 423	Salem	NY	12865
WYSARD JF	RR 2, Box 91, West Lake Rd.	Mayville	NY	14757
ACKROYD KG	5331 Castle Hills Dr.	San Diego	CA	92109
BLAYDON CJ	245 West Maple Ave.	Langhorne	PA	19047
DATER MR	RD Box 5	Salisbury	CT	06409
DUNPHY WW	4 Limekiln Rd	Ridgefield	CT	06877
ENGLISH RB	103 Main St.	Centerbrook	CT	06409
GASKILL JP	1335 Wood Park Dr.	Kennesaw	GA	30144
GERT WA	8815 NE 28th St.	Bellevue	WA	98004
HAKIM PR	1881 Cragin Dr.	Bloomfield Hills	MI	48013
HOLLAND DK	107 Pt O'Woods Dr.	Toms River	NJ	08753
KURTZ D	Paradise Valley Rd. RFD #1 Box 310-W	Bethlehem	CT	06751
MOREY RL	295 Morningsun Ave.	Mill Valley	CA	94741
NEUMEISTER JT	9 Baldwin Dr.	Sussex	NJ	07461
RHODES EA	3343 N.E. 116th St.	N. Miami Beach	FL	33160
STEFFAN KJ	253 Farview Ave.	Long Valley	NJ	07853
TURNER EB	20 Mt. Foraker Ct.	San Rafel	CA	94903
WAGER R	Skyline Ranch Box 8	Jackson	WY	83001
WEAVER LG	Elvirasteig 43	1 Berlin 37		

APPENDIX B

PLAINTIFFS WHO ARE OPTING INTO THIS ACTION

NAME	ADDRESS	CITY	ST	ZIP
ABRAHAM JW	12831 Viscaino Rd.	Los Altos Hills	CA	94022
ADAMS FE	8 Autumn Ridge Rd.	Weston	CT	06883
ADAMS RJ	217 Woodland Dr.	Osprey	FL	33559
ALFORD TL	83 Robin Ridge Dr.	Madison	CT	06443
AMOS JI	2703 St. James Rd.	Belmont	CA	94002
ANDING JD	River Rd.	Wash Crossing	PA	18977
ANTILL WZ	3459 NE 30th Ave.	Lighthouse Pt	FL	33064
ARCHER EL	506 S. Union Ave.	Fergus Falls	MN	56537
ARCHER SH	7340 SW 132nd St.	Miami	FL	33156

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NAME	ADDRESS	CITY	ST	ZIP
ARFSTEN KE	616 Rinaldo St.	Santa Rosa	CA	95405
AVINELIS FE	825 Wootten Dr.	Kerman	CA	93630
BAKER FA	17 Betsy Lane	Ambler	PA	19002
BALDINGER JE	P.O. Box 662	Pullman	WV	26421
BARKER HM	155 N. Harbor Dr. #1712	Chicago	IL	60601
BARNETTE JL	140 NE 53 Ct.	Ocala	FL	32671
BEENE JT	4028 Lynbrook Lane	Arlington	TX	76015
BEHRE RE	101 Sagamore Dr.	Murray Hill	NJ	07974
BERDEAUX BJ	P.O. Box 66-1335	Miami Springs	FL	33266
BERGER RL	3100 NE 49th St. #1102	Ft. Lauderdale	FL	33308
BETHEA WD	2716 Creekbed Lane	Charlotte	NC	28210
BLACK LD	RD 8 Box 236	Flemington	NJ	08822
BLUM JE	137 Elm St.	San Mateo	CA	94401
BRAISTED SC	5961 SW 17th St.	Plantation	FL	33317
BREEN CA	149 Northbridge Ave.	Warwick	RI	02886
BRICKEY RE	2314 South 22nd E.	Salt Lake City	UT	84109
BROWNING DG	740 Penfield St.	Longboat Key	FL	33548
BUTLER DE	Wolzogenstr 17	1 Berlin 27		
BUTLER RE	3840 Wood Ave.	Coconut Grove	FL	33133
BUTTERILL JB	4101 NE 16th Ave.	Ft. Lauderdale	FL	33334
CALVERT JD	10362 Center Dr.	Villa Park	CA	92667
CANEDY DJ	4666 Vernette Dr.	El Cajon	CA	92020
CANTARANO TF	3530 W. 187th St.	Torrance	CA	90504
CARROLL PL	967 W Rambling Dr.	W. Palm Beach	FL	33411
CASEY TB	18 Ellsworth Park	Cambridge	MA	02139
CASSOTIS JN	9 Forest St.	Londonderry	NH	03053
CAVALLARO CF	Box 704	Sharon	CT	06069
CHAMBERLAIN KS	6677 Villa Bonita Rd.	Las Vegas	NV	89102
CLACK RH	RR Box 380	Hamburg	NJ	07419
COHEN SX	Bozener Str 11	1000 Berlin 62		
COLES AE	RD 1 Box 505-B	Stockton	NJ	08559
COMPTON HG	1 Cove Rd.	Brookfield	CT	06804
COOKE WM	407 Sylvia Way	San Rafael	CA	94903
COOPER DE	240 NW Ferry St.	Poulsbo	WA	98370
COOPER JD	RD #1 Box 93	Columbus	NJ	08022
COSHLAND GC	2282 Dosinia Ct.	Reston	VA	22091
CRISTMAN VD	76 Locker St., P.O. Box 151	Beachwood	NJ	08722
CROWL DL	9 Hemlock Dr.	Deep River	CT	06417
CUNNINGHAM JJ	615 Millcross Rd.	Lancaster	PA	17601
CUTCHIN AA	RFD 2 Box 149	Onancock	VA	23417
DAVIS CR	P.O. Box 3339	San Clemente	CA	92672
DICKINSON DC	1212 Winter Spring B	Winter Springs	FL	32708
DIETER CJ	258 East Wood Rd.	Roxbury	CT	06783
DORSEY RM	Roxbury Station	Roxbury	CT	06783

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NAME	ADDRESS	CITY	ST	ZIP
DRENNAN DC	219 Paseo Del Rio	Moraga	CA	94556
DREW HE	16200 Mt. Rose Highway	Reno	NV	89511
DUNKLEE JC	P.O. Box 4166	Incline Village	NV	89450
DWYER DJ	5 Summit St.	Rensselaer	NY	12144
EUBBS SK	20 Mtn. Laurel Lane	Fletcher	NC	28732
EDGERLY DF	57 Rita Dr.	New Fairfield	CT	06810
EGERER RA	1480 Bradley Rd.	Bow	WA	98232
ELLISON GL	20775 Salida Terr.	Boca Raton	FL	33433
FAGERLAND DD	6000 93rd Ave. SE	Mercer Island	WA	98040
FALZARANO VL	7900 SW 146th St.	Miami	FL	33158
FARRINGTON TD	4260 Pines Rd.	Paducah	KY	42001
FELL DM	P.O. Box 615	Homer	AK	99603
FERNANDES DR	R.D. 6, Box 342	Flemington	NJ	08822
FIGUEROA FH	9280 Font'bleau Blvd.	Miami	FL	33172
FINDLAY DJ	P.O. Box 310	Gig Harbor	WA	98335
FLATTER DE	2630 NE 51st St.	Lighthouse Pt.	FL	33064
FLEISCHER RH	349 Vista Linda Dr.	Mill Valley	CA	94941
FLYNTZ J	63 Summit Rd.	Sparta	NJ	07871
FOURNET DJ	154 Gerald Dr.	Danville	CA	94526
FOXWORTH TG	5449 Rutherford Dr.	Woodbridge	VA	22193
FRIEND PE	2404 Lakefrt Dr.	Knoxville	TN	37922
FROST S	2760 NE 23rd Place	Pompano Beach	FL	33062
FUSTER AS	8125 Westbourne Dr.	Pensacola	FL	32506
GAGE LC	2255 Sunrise	Reno	NV	89509
GALLI RP	11 Gill St.	Exeter	NH	03833
GEORGE RL	6605 Tina Lane	McLean	VA	22101
GICK RP	2363 Greenswaro S.	Warrington	PA	18976
GIDDENS DR	390 Everett Place	Danville	CA	94526
GIROUARD NG	1701 NE 64th St.	Ft. Lauderdale	FL	33334
GOLIBER JT	25 Pine Hill Bend	Ballston Lake	NY	12019
GOOLSBY TE	RD 1 Sunset Lane	Washington Depo	CT	60794
GORMAN LR	P.O. Box 20862	Billings	MT	59104
GREINER RM	465 Harwood Ave.	Satellite Bch.	FL	32937
GUETTLER DP	Gustav Freytag 15	1 Berlin 33		
HAMAN DB	PO Box 131, Candlewood Isle	New Fairfield	CT	06812
HARLAN RR	5850 Cameron Run Ter.	Alexandria	VA	22303
HATCH TE	9 Appletree Way	Long Valley	NJ	07853
HEATHCOCK AD	524 Fawns Walk	Annapolis	MD	21401
HEEMSTRA JW	Winston Dr.	Washington Depo	CT	06794
HEINRICH RW	P.O. Box 1575	Allentown	PA	18105
HEWLETT BN	Bogus Hill #248	New Fairfield	CT	06812
HICKS LM	169 Rutledge Ct.	Conroe	TX	77302
HOFF TL	1503 Quaker Ridge	Austin	TX	78746
HOFFMAN DJ	1800 S.W. 75th Terr.	Plantation	FL	33317
HOFFMAN R	17 Skylark Rd.	Bloomingburg	NY	12721

APPENDIX B

NAME	ADDRESS	CITY	ST	ZIP
HORROCKS AG	56 Old Bridge Rd.	Brookfield	CT	06804
HUBER DE	420 NE 9th Ave.	Ft. Lauderdale	FL	33301
HUDSPETH CB	1099 Tilton Rd.	Sebastopol	CA	95472
HUESMAN MJ	73 Shore Land Dr.	Key Largo	FL	33037
HUNSBERGER LM	7194 Hillcrest Dr.	Macungie	PA	18062
HURD TL	P.O. Box 1384	Park City	UT	84060
HUSKEY BP	Rt. 7 Box 163, South Rugby Rd.	Hendersonville	NC	28739
ISRAELITE DZ	116 Central Park So.	New York	NY	10019
JOHNSTON IR	2361 Morrison Lane	Suisun	CA	94585
JONES JH	741 Marshall St.	Beverly	NJ	08010
JORGENSEN CW	47 Mohawk Ave.	Corte Madera	CA	94925
JUNG DH	Clayallee 44	1000 Berlin 33		
KANE TJ	1228 S. Inverness Way	Fresno	CA	93727
KANODE JS	Wingfield Res. Est., 1763 Cocoplum Ct.	Longwood	FL	32779
KASPAR MA	Box 321	Lumberton	NJ	08048
KAST R	41 White Pine Dr.	Brookfield Ctr.	CT	06805
KAY RE	RD 2 Box 162E	New Hope	PA	18938
KELLY PL	P.O. Box 331S Rd., Rhododendron Rd.	Fitzwilliam	NH	03447
KELLY WH	85 Viscount Dr., A-62	Milford	CT	06480
KIEHLE GA	1486 Country Club Dr.	Los Altos	CA	94022
KILLER RE	3309 Melendy Dr.	San Carlos	CA	94070
KILLMON BC	RT 1 Box 756	Moore Haven	FL	33471
KLINE WJ	P.O. Box 66	Elkton	FL	32033
KNOWLES HW	1697 N. Goldeneye Ln.	Homestead	FL	33030
KNUDSON RC	2200 Panorama Way	Salt Lake City	UT	84124
LAMAR JW	7007 Erland Rd.	Santa Rosa	CA	95405
LAMBERT TD	Laurel Lane	New Castle	NH	03854
LARSON LT	5213 NW 58th Court	Gainsville	FL	32606
LASH JF	578 Caber Drive	Santa Rosa	CA	95405
LAUMEYER RH	Box 548	Teton Village	WY	83025
LEET AC	4493 Faraone Court	San Jose	CA	95136
LEGARE MT	3761 NW 100th Ave.	Coral Springs	FL	33065
LESTER GT	2171 30th Ave.	San Francisco	CA	94116
LEWIS EW	Box 2102	Castro Valley	CA	94546
LIGHT HA	2870 NW 107 Ave.	Coral Springs	FL	33065
LIVINGSTON DB	19 Stoney Brook Rd.	Holmdel	NJ	07733
LONGLEY JD	240 Shore Drive, P.O. Box 567	Ozona	FL	33560
LOWRY JR	4 Miller Place Rd.	Miller Place	NY	11764
MACGLASHAN DH	78 Nut Plains Rd.	Guilford	CT	06437
MAGUIRE JM	Harborview Dr., Box 321	Essex	CT	06426
MANCHESTER SA	99 Broadmoor Ct.	Novato	CA	94947
MANN KA	981 Bluebird St.	Naples	FL	33942

APPENDIX B

NAME	ADDRESS	CITY	ST	ZIP
MARINO JM	25 Spring Garden Ave.	Colts Neck	NJ	07722
MASON T	350 Orion Court	Merritt Island	FL	32953
MAYER RL	220 Ersilia Trail	Alamo	CA	94507
MCALINDEN GI	3 Elm S., PO Box 194	Hopewell	NJ	08525
MCCONNELL RH	1330 Concord St.	Los Altos	CA	94022
MCEWAN JL	Rose Farm Center Rd.	Lyndeboro	NH	03082
MCKAY EA	19 Elizabeth's Way	Chatham	MA	02633
MCLAY D	920 Lake Forest Rd.	Clearwater	FL	33575
MCLEAN BE	1116 SW 4th Court	Gresham	OR	97030
MICHEL FL	3215 Norman Dr.	Reno	NV	89509
MILLER C	235 Linden Dr.	Boulder	CO	80302
MILLER KG	764 Berkshire Dr.	Millbrae	CA	94030
MONACO DR	P.O. Box 1768	Orinda	CA	94563
MONTGOMERY DC	2012 Leisure Dr. NW	Winter Haven	FL	33881
MOONEY WJ	10900 SW 112th Ave.	Miami	FL	33176
MORRIS GS	2115 Skyline Blvd.	Reno	NV	89509
MORRISON HA	18 Plaisted St.	Bangor	ME	04401
NEEDHAM FS	1777 Coralway North	Vero Beach	FL	32963
NELSON LM	6999 Estes Dr.	Arvada	CO	80004
NESSA NA	Box 78	Solebury	PA	18963
NEWBERRY JI		Powersville	GA	31074
NEWMAN GM	5530 Ambrose Drive	Reno	NV	89509
NOLAN CC	4189 Dimholt Court	Winston Salem	NC	27104
NOTINE DM	503 Bay 5th St.	West Islip	NY	11795
ODOM HB	220 Jagoe St.	Denton	TX	76201
OLASZ E	P.O. Box 1005	Sanibel	FL	33957
OMURA LH	First Street	Connelly	NY	12417
ORR CW	13 E. Townhouse Lane	Grand Praire	TX	75051
OTT DE	P.O. Box 5182	Incline Village	NV	89450
OUELLETTE CA	556 So. Ely Blvd.	Petaluma	CA	94952
PAPA HW	3806 Ashley Dr. S.	Mobile	AL	36608
PARKER RC	323 Beach Rd. North	Wilmington	NC	28405
PARKER WS	245 E. 54 St., #15J	New York	NY	10022
PATE DC	Kniephof Str. 26A	1 Berlin 41		
PENN RA	4063 N. Canyon Rd.	Camino	CA	95709
PESZYNSKI PR	1105 Via Media	Lafayette	CA	94549
PIAVIS WW	4460 Lambert Dr.	Kennesaw	GA	30144
PINGREY RH	114 Sandalwood Ct.	Santa Rosa	CA	95401
PLASKON WG	P.O. Box 1143	Mill Valley	CA	94942
PLATTS RP	2024 Quincy Ct.	Salina	KS	67401
POIRIER EJ	209 Patricia Ave.	Delran	NJ	08075
POPE TW	3522 Central Ave.	Nashville	TN	37205
POUY FR	36 Flying Cloud Rd.	Stamford	CT	06902
PROFT CJ	4842 Fremont Ave. S.	Minneapolis	MN	55409
QUIMBY CF	2829 Ellis St.	Bellingham	WA	98225
RAGLAND JD	980 SW 74th Terrace	Plantation	FL	33317

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NAME	ADDRESS	CITY	ST	ZIP
REDMAN FW	RR #1 Box 432	Bethel	CT	06801
REMPE WH	Lake Road	Newtown	CT	06470
ROBBINS RD	13 Winterberry Dr.	Amherst	NH	03031
ROGERS GA	128 Byram Shore Rd.	Greenwich	CT	06830
ROSS RM	2335 Odyssey Way	Toms River	NJ	08753
RUPP RN	6 Summit Ct.	Woodbury	CT	06798
SABELLA RR	2720 NE 42nd St.	Lighthouse Pt.	FL	33064
SALISBURY WT	535 Fielder's Lane	Toms River	NJ	08753
SAVAGE KD	640 Ridgewood Rd.	Key Biscayne	FL	33149
SCHAKE WE	4039 White Oak Ct.	Sonoma	CA	95476
SHAVER JK	48 Cottontail Rd.	Norwalk	CT	06854
SHEASLEY GF	16919 N.E. Clackamas	Portland	OR	97230
SHELFKO KA	Rt. 3, Box 630 B1	Spokane	WA	99203
SHUMAN JH	7901 SW 154 Terrace	Miami	FL	33157
SHUSTER JF	RD #1 Achortown Rd.	Beaver Falls	PA	15010
SLIFKA RL	4359 Mt Helix, Highlands Dr.	La Mesa	CA	92041
SMITH CD	9903 NW 19th St.	Coral Springs	FL	33065
SMITH WT	237 Redwood Lane	Cheshire	CT	06410
SMITHSON RB	2253 Gilman Dr. W. #501	Seattle	WA	98119
SONOMURA A	5152 Maple	Irvine	CA	92714
SPANGENBURG RB	9106 Lyon Park Ct.	Burke	VA	22015
SPILLANE WD	1020 Aoloa Pl. #208A	Kailua	HI	96734
STAUFFER DL	P.O. Box 2627	Truckee	CA	95734
STEGMANN EP	1223 Eddie Dr.	Port Orange	FL	32019
STEPHENSON JE	Janick Strasse 75	1 Berlin 37		
STOECKER GG	P.O. Box 33-1150	Coconut Grove	FL	33133
THIELE GF	2 Pine Tree Hill Rd.	Newton	CT	06470
THOMAS JR	RR #2 Box 952A, Hwy. 24	Chester	NJ	07930
THOMAS WM	1018 Great Oaks Dr.	Hopkinsville	KY	42240
THOMPSON JM	26505 Dutcher Creek	Cloverdale	CA	95425
THORUP JS	1845 N. Santa Rita	Tucson	AZ	85719
TINGLE TH	P.O. Box 3085	Incline Valley	NV	89450
TOOKE HW	408 Timber Lane	Newton Square	PA	19073
VAN NOTE TE	3 Brookview CT	Ho-Ho-Kus	NJ	07423
VOTRUBA WK	251 Crandon Blvd., #129	Key Biscayne	FL	33149
WACHTEL MR	24 Hastings Dr.	Northport	NY	11768
WAGNER DC	53 Main St.	Ridgefield	CT	06877
WAGNER RK	Rt. 2 Box 144A-5	Umatilla	FL	32784
WAGNER RR	165 Penn Harb Rd.	Pennington	NJ	08534
WALCHLI DC	2524 Laguna Vista Dr.	Novato	CA	94947
WALTERS AE	P.O. Box 37	Pleasant Mount	PA	18453
WARD TB	528 Parker Ave. SE	Decatur	GA	30032
WEBB RB	6420 Boca del Mar Dr. #406	Boca Raton	FL	33433
WEBER HL	82 Eleven Levels Rd.	Ridgefield	CT	06877

APPENDIX B

NAME	ADDRESS	CITY	ST	ZIP
WIK DC	2610 Patio Simpatico	Lake Havasu Cy	AZ	86403
WILLETT WA	Rt. 1, Box 263	Dundee	OR	97115
WILLIAMSON KA	9 Swan Lane	Hauppauge	NY	11788
WILTJER JR	623 South Pitt St.	Alexandria	VA	22314
WOOD CL	1809 Edenwald Lane	Lancaster	PA	17601
WOOLDRIDGE DW	Rt. 3, Box 81	Muskogee	OK	74401
WOOLSEY SD	14 Creekwood Ct.	Danville	CA	94526
WREN RP	RFD 1, Box 516C	Heber City	UT	84032
YELTON RW	680 Miller Dr. 205W	Miami Springs	FL	33166
YOUNG GF	P.O. Box 76	Stanfordville	NY	12581
ZIPRIS M	7411 S.W. 9th St.	Plantation	FL	33317
TAYLOR GG	10840 Nollwood Dr.	Chardon	OH	44024
THOMAS HS	Unter Den Eichen 114	1000 Berlin 45		
THOMPSON JP	22763 A Voss Ave.	Cupertino	CA	95014
THORNE ED	10467 Plum Tree Lane	Cupertino	CA	95014
VOGEL RK	1740 Donner Dr.	Santa Rosa	CA	95404
VAN GORDINER SB	2503 Bethaway	Orlando	FL	32806
WARE PN	8201 N.W. 37th St.	Coral Springs	FL	33065
WENTZ RL	Box 137	Hope	NJ	07844
WHITE RS	15825 S.W. 87th Ave.	Miami	FL	33157
WILLIAMS DD	Holstwig 20	1 Berlin 37		
AUSTIN RF	120 Candlewood Hgts.	New Milford	CT	06776
BARNES PD	35 Mistletoe Dr.	Covington	LA	70433
BEAN WS	Beeren Str. 32-34	1000 Berlin 37	W. Germany	
BENTLEY TR	3809 Wooded Creek Dr.	Farmers Branch	TX	75234
BOMBACH LA	547 W. Shore Tr.	Sparta	NJ	07871
BROWN RC	16750 S.W. 90 Ave.	Miami	FL	33157
DOUGHERTY DM	RD 7, Box 7544	Stroudsburg	PA	18360
ETHERSON JT	428 Norwood Court	Fort Myers	FL	33907
FENTNER CJ	5322 SW 118 Ave.	Cooper City	FL	33330
FOSTER MB	246 2nd Ave.	Santa Cruz	CA	95062
GILKES DE	917 Smith Dr.	Metairie	LA	70005
HANLEY MD	20400 SW 50th Pl.	Ft. Lauderdale	FL	33330
HASELBY JW	Tegel Flughaven	1000 Berlin 51	W. Germany	
HERRERA FM	Ten Rod Rd., RR 1, Box 472	Exeter	RI	02822
HYMAS HV	32492 RD 168	Visalia	CA	93291
JENKINS DW	8753 Wimbledon Dr.	Knoxville	TN	37923
KERREY TW	2100 Country Club Rd.	Eustis	FL	32726
KOSS CD	P.O. Drawer D	Miami Springs	FL	33266
KYLE AM	Blood St.	Lyme	CT	06371
LANGE RO	1099 31st Ave.	San Mateo	CA	94403
MARSHALL JF	5 Cove Lane	Eustis	FL	32726
McCABE JR	1001 Crescent Dr.	Greencastle	IN	46135

APPENDIX B

NAME	ADDRESS	CITY	ST	ZIP
O'CONNOR JH	101 Gray Rock Rd.	Trumbull	CT	06611
O'DELL T	307 Kent Dr.	Cocoa Beach	FL	32931
OVERBY WC	7802 Cherry Place Ct.	Humble	TX	77346
RICH RA	1205 W. Dunne Ave.	Morgan Hill	CA	95037
SAVOIE JC	6544 Harbour Rd.	N. Lauderdale	FL	33068
SAXON BF	1092 Serena Way	San Marcos	CA	92069
SCHLOTE FE	20 Roton Ave.	Rowayton	CT	06853
SCROGGIN GC	5325 SW 63d Ave.	Miami	FL	33155
SMITH DP	Rt. 1, Box 975B99	Pensacola	FL	32507
STULL FP	885 N.W. 6th Dr.	Boca Raton	FL	33432
TAYLOR JR	5116 S.W. 72d Ave.	Miami	FL	33155
WATERS DR	411 S.E. 13th Ave.	Pompano Beach	FL	33060
DOSS WW	14211 SW 104th Ave.	Miami	FL	33176
CRAHEN RR	3533 4th Lane, SW	Vero Beach	FL	32962
GAY HM	RD #1, Box 1329	Bangor	PA	18013
O'BRIEN SA	P.O. Box 1104	Hollister	CA	95024
STABENAU HM	20439 Interlachen Ln.	Troutdale	OR	97060
WOLF WA	Box 3016	Stateline	NV	89449
ZIESMER RA	501 29th Ave. Ct.	Poyallup	WA	98371
ALMQUIST GN	SR #1, Box 127-M	Hawley	PA	18428
ANDERSON AR	Wareneck P.O.	Wareneck	VA	23178
ACKINSON WP	Hohenzollern 1B	1000 Berlin 39		
BACON RN	348 Velma Dr.	Largo	FL	33540
BAILEY C	RR #5, Echo Valley Rd.	Newtown	CT	06420
BISH LW	752 Ridge Dr.	McLean	VA	22101
BROOKS RS	7440 NW 6th St.	Plantation	FL	33317
BURGER JJ	5 Woodsvale Rd.	Madison	CT	06443
BURROUGHS WJ, Jr.	9 Maple Ln.	Brookfield	CT	06804
CRAIG DC	1955 NW 108 Ln.	Coral Springs	FL	33065
COBB JP	Berlin Pilot Mail PAA Hangar 17 MR	Jamaica	NY	11430
CROSS RL	2225 Colusa Hwy.	Yuba City	CA	95991
FREDERIC GC	Box 6152	Incline Vlg.	NE	89450
FULLER BB	5072 Country Club Way	Pt. Orchard	WA	98366
GOELTZ FS	2168 Candelero	Santa Fe	NM	87505
HUMBLE RA	5770 SW 114th Ter.	Miami	FL	33156
HAWES LJ	1407 Ball Road	Eagle Pt.	OR	97527
KANE M	Johannisburgeralle 3	1 Berlin 19		
KELLEY R	295 Dayton Rd.	S. Glastonbury	CT	06073
KLEIN RL	Box 322	Rowayton	CT	06853
KELLEY EG	14300 Clayton Rd.	San Jose	CA	95127
LAMP RJ	6300 Rogers Circle	Lincoln	NE	68506
LEINBACH SP, Jr.	317 Fairmont Ave.	Winchester	VA	22601
LEWIS JW	Box 43 Star Rt.	Pleasant Mt.	PA	18453
LITTLEPAGE MJ	186 Vineyard Rd.	Huntington	NY	11743

APPENDIX B

NAME	ADDRESS	CITY	ST	ZIP
LONG TE	1530 Alabama Dr.	Winter Park	FL	32789
MEFFERT MD	Gelding Hill Rd.	Sandy Hook	CT	06482
McKAY DI	Teel Rd.	Fairfield	NY	13336
MERCIER RD	8 Gina Dr.	Centerport	NY	11721
NEUWALD EJ	Box 4074	Tequesta	FL	33458
NEWSTROM HM	Box 787	Somis	CA	93066
PANZER DA	Beergnstrasse Fa	1 Berlin 37		
PARRAGA WA	Box 3753	Incline Village	NY	89450
PENWELL GS	24290 Sailview Dr.	Elmira	OR	97437
PHILLIPS, CM	Fechnerstr. 16	1 Berlin 31		
REMELY B	518 N 17th Ave.	Bozeman	MT	59715
RHODES SS	1956 Port Cardiff Pl.	Newport Bch.	CA	92660
SMITH LW	Rt. 1, Box 420	White Salmon	WA	98672
SMITH W	Box 962	San Mateo	CA	94403

Opinion of the District Court

THE COURT: This is the decision of the Court.

After oral argument in open court, plaintiffs, John C. Cook, et al., have failed to demonstrate that the instant action is anything other than a collateral attack upon an order of this Civil Aeronautics Board ("CAB") that was not appealed in accordance with the provisions of Section 1006 of the Federal Aviation Act (49 USC Section 1486(a)).

Such challenges to an order of that agency directly contravene the comprehensive regulatory scheme established by Congress in the Federal Aviation Act of 1958.

It is by now well settled that federal district courts are powerless to adjudicate such actions. See City of *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334-337 (1958); *Callanan Road Improvement Co. v. United States*, 345 U.S. 507, 512-513 (1953); *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 381-382 (1922); *City of Rochester v. Bond*, 603 F.2d 927 (D.C. Cir. 1979); *Carey v. O'Donnell*, 506 F.2d 107, 110 (D.C. Cir. 1974); *Kesinger v. Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973); *Oling v. Air Line Pilots Association*, 346 F.2d 270 (7th Cir. 1965).

Plaintiffs' reliance on *Clayton v. Republic Airlines, Inc.*, 716 F.2d 729 (9th Cir. 1983) is misplaced. As the Ninth Circuit explained in *Clayton*, the issue with which that court was confronted was one of first impression in the Ninth Circuit and had not been the subject of the holdings in *Carey*, *Kesinger*, or *Oling*.

See *Clayton v. Republic Airlines, Inc. surpa*, 716 F.2d at 730. See also *Zapp v. United Transp. Union*, 727 F.2d, 617, 627 n.16 (7th Cir. 1984).

Moreover, the court finds plaintiffs' reliance on *McDonald v. City of West Branch, Mich.*, 104 S. Ct. 1799 (1984) and *Alexander v. Gardner Denver Company*, 415 U.S. 36 (1974) unpersuasive. Stated simply, those cases are inapplicable to the instant context. In both *McDonald* and *Alexander* the Supreme Court

addressed the issue of whether or not a federal court may accord pre-inclusive effect to an unappealed arbitration award that had been rendered pursuant to a collective bargaining agreement. In both cases, the Supreme Court declined to hold that the arbitral award precluded, under the doctrine of *res judicata*, litigation under federal statutory schemes specifically designed to vest control over instances of discrimination with the judiciary.

The instant action, however, does not rise or fall with the doctrine of *res judicata*. Instead, plaintiffs are precluded from raising their claims in this court under the principle that collateral attacks in a federal district court on the orders of administrative agencies are not permitted. As the Supreme Court earlier explained in *City of Tacoma v. Taxpayers supra*, 357 U.S. at 336-37:

> "(U)pon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all. For Congress, acting within its powers, has declared that the Court of Appeals shall have 'exclusive jurisdiction' to review such orders, and that its judgment 'shall be final,' subject to review by this Court upon certiorari or certification. Such statutory finality need not be labeled *res judicata*, estoppel, collateral estoppel, waiver, or the like, either by Congress or the courts."

Accordingly, the court is constrained to hold that it lacks subject-matter jurisdiction over the causes of action asserted in plaintiffs' complaint. Defendant Pan American World Airways, Inc.'s motion to dismiss the complaint is granted. The motions of defendants Air Line Pilots Association International, and Flight Engineers International Association, Pan Am Chapter, to dismiss the complaint or in the alternative for summary judgment are granted.

The motion of Charles P. Caudle and Vincent Wynne to intervene is denied as moot.

The respective motions shall be endorsed in accordance with the oral decision of this court.

The action is dismissed in its entirety without prejudice to the right of plaintiffs to petition the CAB for a reopening of the proceedings conducted in that forum or to seek relief in any other appropriate forum. No costs.

It is so ordered.

The clerk is directed to enter judgment in accordance with this decision.

Is there anything further?

Thank you.

I (We) hereby certify that the foregoing is a true and accurate transcript to the best of my (our) skill and ability from my (our) stenographic notes of this proceeding.

/S/ _____

Official Court Reporter

THE FEDERAL AVIATION ACT

Section 1006 (49 U.S.C. § 1486):

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Judicial review

Orders subject to review; petition for review

(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

Notice to Board or Administrator; filing of record

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of Title 28.

Power of court

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm,

modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good order cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

Conclusiveness of findings of fact; objections

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Review by Supreme Court

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of Title 28.

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